No. 2504.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. A. SMITH LUMBER AND MANUFACTURING COMPANY, a corporation,

Plaintiff in Error,

vs.

JOHN A. PARKER,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT.

In the month of December, 1908, John A. Parker (Defendant in Error) was in the employment of C. A. Smith Lumber & Manufacturing Company (Plaintiff in Error) at its sawmill, called the C. A. Smith mill, near Marshfield, Coos County, Oregon. While in the course of his employment he received an injury in his left leg which he attributed to the carelessness and negligence of the defendant.

While employed, the Plaintiff in Error deducted from his wages one dollar per month for medical and hospital charges and furnished him a physician and

surgeon. Parker claimed that such physician treated him for his injury in a careless and unskillful manner, as a result of which injury and treatment Parker's right hand was necessarily amputated on February 6. 1909.

By reason of these matters, Parker claimed to have a cause of action against Plaintiff in Error for the loss of his hand, the humiliation of being a cripple resulting therefrom, for pain and suffering incident thereto, and for loss of time.

About May, 1909, the company, through C. A. Smith (president) and Mr. Mareen (general superintendent), began negotiations with Parker for a settlement of his claim. Before any sum of money was agreed upon, Mareen stated (Tr. 108):

> "At last he says he would give me half-time; that was the best he could do, and he says 'We will give you a job.' Well, I says, probably the company will break up, something like that, and I won't have no job; well, he says, 'We will give you a job as long as the company holds together or as long as you want it.' That is just about the words he used."

In addition, the company agreed to pay the doctor's bill and the bills for medicines at another drugstore.

At Tr. 108, Parker says:

> "So, **I went to work** in the meantime, if I remember right, and I worked a little over a month on the trimmer, helper; I was on the big trimmer at that time; they had no air at that time, so I went as a helper. I worked about a month or a little over and took an attack of appendicitis."

He was operated on for appendicitis, and thereafter, and under date of September 25, 1909 (Tr. p. 127), the release was signed. Parker continued in the employment of the company until his wrongful discharge, on January 31, 1913, and was earning the sum of $3.00 per day.

Parker's services were satisfactory to defendant, and at all times he was, and is, capable of rendering service for the defendant as timekeeper, or looking after its store, or measuring its lumber, or operating the trimmer built so that he could run it with one hand, and was, and is, capable of earning the sum above specified. On January 31, 1913, the Plaintiff in Error unlawfully and fraudulently and without cause discharged Parker, and ever since refused, and still refuses, to reinstate him. At that time Parker was thirty-one years of age, had an expectancy of thirty-nine years, and had no other means of earning a livelihood save and except by laboring, and by reason of his crippled condition he could not procure employment elsewhere.

By reason of the facts above set forth, Parker instituted action against the Plaintiff in Error for $30,000.00 (Tr., pp. 5-10). In due course a demurrer (Tr., pp. 25-26) was filed to the complaint alleging the above facts, and the parties agreed that the writing which Parker executed is, in words and figures, as follows:

> "(Tr., pp. 27-28.) For the sole consideration of the sum of Four Hundred Ten 75-100 Dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Manufacturing Company, I do hereby acknowledge full satisfaction and discharge of all claims accrued or to accrue in respect to all injuries and injurious

results directly or indirectly arising or to arise from an accident sustained by me on or about the 16th day of December, 1908, while in the employment of the above.

$410 75-100. (Signed) JOHN A. PARKER,

Witness: ARNOLD MEREEN,
Marshfield, Oregon.

Witness: DAVID NELSON,
Marshfield, Oregon."

And that such document should be considered in argument of the demurrer the same as if set forth in the complaint.

After argument the demurrer was overruled, and thereafter the defendant answered (Tr., pp. 31-39), alleging inter alia that the consideration stated in payment of release was the only consideration for the settlement of the controversy, and denying the agreement for employment claimed by Parker.

The reply (Tr., pp. 39-40) denied the new matter of the answer.

At the trial a verdict (Tr., p. 41) in favor of Parker and against the Plaintiff in Error for $2,500.00 was given. Whereupon (Tr., pp. 42-43) judgment was duly entered.

Thereafter a motion for a new trial was made, the grounds of which are stated at (Tr., p. 44).

In the record (Tr., pp. 45-93) are set forth certain affidavits, to-wit:

Of John D. Gross (Tr., pp. 45-48);

A. L. Butts (Tr., pp. 48-51);

R. P. Herrington (Tr., pp. 51-52);

L. S. O'Connor (Tr., p. 52);

Wm. C. Hayden (Tr., p. 53);
Alfred Johnson (Tr., p. 54);
Chas. Dennison (Tr., p. 55);
J. P. Malony (Tr., pp. 56-57);
Fred Moore (Tr., p. 58);
Walter M. Richardson (Tr., pp. 58-59);
Bernt Matheson (Tr., pp. 59-61);
George Rourke (Tr., pp. 61-63);
F. H. Dresser (Tr., pp. 63-65);
Wm. T. Stoll (Tr., pp. 66-69);
John D. Goss (Tr., pp. 69-71);
Exhibit A thereof (Tr., pp. 72-73);
Wm. T. Stoll (Tr., pp. 73-75);
A. L. Butts (Tr., pp. 75-77);
Isham N. Smith (Tr., pp. 78-93).

None of these affidavits are embodied within any bill of exceptions, nor are they certified, identified or in any way shown to be all or the sole and only affidavits in the case, nor is there any certificate or bill of exceptions certifying that they were used on the motion for a new trial or otherwise.

In the brief, appellant has specified twenty-one assignments of errors, which we will discuss under the heading which Plaintiff in Error has discussed them.

Upon this appeal, the Defendant in Error will rely upon the following

POINTS AND AUTHORITIES

Point I.

That affidavits (Tr., pp. 45-94) are no part of this appeal, because of the absence of any certificate from any person identifying them or certifying that they are the sole or only affidavits used on motion for a new trial or that they were so used.

In the absence of such showing, the affidavits should be stricken from the record.

L. O. L., Sec. 169 (Cases).

State v. Kline, 50 Ore. 426. (Syllabus, Points 2, 10, 12 and 13.) (Opinion proper, pages 430, 433, 434 and 435.)

Myer et al. v. M. & T. Imp. Co., 85 Fed. 874.

Point II.

Statute of Frauds—Oral Testimony.

In Oregon it is settled that

> "Though the terms of a writing cannot be varied by parol evidence, yet where a contract is not required by the Statute of Frauds to be in writing, the rule is not violated by admitting evidence of parts of the contract not contained in the writing."

Holmboe v. Morgan, 69 Ore. 395. (Syllabus, Point 2.) (Opinion, page 400.)

An agreement for work and labor is not within the Statute of Frauds.

L. O. L., 804, 805, 806.

Parol evidence thereof was clearly admissible.

Holmboe v. Morgan, 69 Ore. 395, supra.

Pennsylvania Co. v. Dolan, 6 Ind. App. 109; 51 Am. State, 289; 32 N. E., 802.

Cox v. B. & O. S.-W. R. Co., 50 L. R. A. N. S. 453.

Barghoorn v. Moore, 6 Ida. 531 (57 Pac. 265).

White v. Merrill, 32 Ill. 511.

Allen v. Tacoma Mill Co., 18 Wash. 216 (51 Pac. 372).

Rader v. McElvane, 21 Ore. 56 (Point 2).

Looney v. Rankin, 15 Ore. 617 (619).

Lewis v. 1st Nat. Bank, 46 Ore. 182 (192, 193).

Moore v. Rice, 36 Neb. 212 (54 N. W. 308).

Warner v. T. & P. R. Co., 164 U. S. 416 (418); (Book 41 L. 495).

Hobbs v. Brush Elec. Co. (Mich.), 42 N. W. 965.

Fire Ins. Co. v. Wickham, 141 U. S. 564.

Point III.

The contract to give Parker employment was suf-

ficiently definite, certain and binding to sustain this action.

Pierce v. Tenn. Coal, Iron & Ry. Co., 173 U. S. 1 (Book 43 L. 591).

And in the following state decisions, cases of like import have been sustained whenever and wherever presented:

Mich.—Hobbs v. Brush Elec. Co., 42 N. W. 965.

Ind.—Pa. Co. v. Dolan, 51 Am. State, 289.

Ill.—Gourley v. West Chicago St. R. Co., 96 Ill. App. 68.

Minn.—Smith v. St. Pete R. Co., 60 Minn. 330.

Mo.—Boggs v. Pac. Steam Laundry Co., 171 Mo. 282.

Mo.—Forbs v. St. Louis, etc. R. Co., 167 Mo. App. 661.

N. Y.—Usher v. N. Y. Cent. etc. R. Co., 76 N. Y. App. Div. 42; 179 N. Y. 544.

Texas—E. Line Ry. Co. v. Scott, 72 Tex. 70.

Texas—Midland R. Co. v. Sullivan, 20 Tex. Civ. App. 50.

Texas—Carroll v. Missouri R. Co., 30 Tex. Civ. App. 1.

W. Va.—Rhoades v. Chesapeake R. Co., 49 W. Va. 495.

Point IV.

Motion for New Trial.

Among the grounds of motion for a new trial (Tr., p. 44) are:

1. "That defendant was prevented from having a fair trial by the failure of its witnesses to appear and the refusal of the Court to grant further time therefor.

2. "By accident and surprise, as follows:

(a) That defendant and defendant's attorneys were surprised by the refusal of plaintiff and plaintiff's attorneys to allow the postponement of the said trial until after the hearing of the preceding case as had theretofore been agreed upon.

(b) By the breaking down of the automobile in which witnesses Dresser, Matheson and Rourke were coming to said trial, which prevented their arriving in time therefor as they otherwise would have done.

3. "On account of newly discovered evidence as motion sets forth in the affidavits hereto annexed and hereby made a part hereof."

L. O. L. 174 provides, relative to new trials:

"**For What Cause Granted.** A former judgment may be set aside and a new trial granted on motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

1. * * * *

2. * * * *

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial."

In order to grant a new trial for newly discovered evidence, it must appear:

1. That the evidence is such as would probably change the result.

2. That it was discovered since the trial.

3. That it could not have been discovered before the trial by ordinary diligence.

4. It must be material and not merely impeaching nor merely cumulative.

Territory v. Latshaw, 1 Ore. 147. (Deady, J.)

Lander v. Mills, 3 Ore. 40.

State v. Gardner, 33 Ore. 149.

State v. Majors, 36 Ore. 38 (Point 8, Syllabus).

State v. Hill, 39 Ore. 90 (94, 95, 96).

L. O. L. 700, defining cumulative evidence.

Hanley v. Life Ins. Co. of America, 69 Mo. 380 (383).

Town of Manson v. Ware, 19 N. W. 275 (276).

Point V.

Where admissions of a party are given at the trial, other admissions of the same character as to the same point are cumulative.

Hines v. Driver, 100 Ind. 315.

Twine v. Kilgore, 3 Okla. 640.

Winne v. Newman, 75 Va. 811.

Manson v. Ware, 63 Ia. 346.

Hawkins v. Kermode, 85 Ga. 116.

Kruger v. City of Merrill, 27 N. W. 837.

Thisler v. Miller, 36 Pa. 1060 (Kans.).

Point VI.

Though newly discovered evidence is material, not cumulative, and not merely impeaching, **and there is no proof that it could not have been discovered before by the exercise of due diligence, a new trial will not be granted.**

People v. Priori, 58 N. E. 668 (Point 8).

29 Cyc. 873, 874.

Point VII.

Where a person relied upon the promise of a witness to attend and failed to have him subpoenaed, the witness' absence is no ground for a new trial.

Roach v. Colburn, 76 Mo. 653.

Rogers v. Hughes, 1 Cal. 429 (433).

Twine v. Kilgore, 39 Pac. 388 (389).

Eiche v. Taylor, 17 Minn. 172. (Sick; impossible to be present.)

Mortimer v. Dirks, 107 Pac. 184 (186) (Wash).

Quaghana v. Jersey City, 71 Atl. 43.

Point VIII.

The oral contract made in June having been executed, it was competent to prove it, and under the issues to submit the case to the jury.

Mobile & M. R. Co. v. Jurey, 111 U. S. 584 (597); (Book 28 L., 527, especially 530).

P. C. Co. v. Yukon I. T. Co., 155 Fed. 29 (Point 7, discussed page 37), (9 C. C. A., per Hunt, J.).

ARGUMENT.

The Defendant in Error moves to strike from the transcript all the affidavits on pages 45-93, inclusive, upon the following grounds:

1. There is no certificate in the record

(a). Identifying these affidavits as having been used in the court below;

(b) Stating that they are the only affidavits so used;

(c) Certifying that the court used them in any manner.

2. The said affidavits are not embodied or embraced within any bill of exceptions.

It is "Horn-book" law that affidavits or matters used must be certified and identified as all and the only affidavits used at the hearing of the matter concerning which they are proposed. In addition, they must be settled in a bill of exceptions.

Under the authorities cited at Point 1, further argument is unnecessary. These affidavits should be stricken.

But if this motion is overruled, then, on the merits of the motion for a new trial on the first three causes set forth therein (Tr., p. 43) we state there is nothing in the record to show that the witnesses could give any new evidence which was discovered after the trial, nor that the witnesses were subpoenaed to attend the trial, nor that any diligence was used to discover the witnesses Johnson, Herrington, Molony, Dennison, Moore, Richardson and Hayden before the trial, nor that the Plaintiff in Error used any diligence to procure the attendance of Dresser, Matheson and Rourke.

These cases were set by Isham N. Smith (of counsel for Defendant in Error) and immediately upon such setting and on, to-wit: April 20, 1914, he wrote William T. Stoll, and on April 21, 1914, wrote John D. Goss, letters set forth at Tr., p. 79-80, 80-81, to which John D. Goss, attorney for Plaintiff in Error, replied (Tr., p. 82) as follows:

"Littlefield & Smith, Portland, Oregon.

Re Aho and Parker Cases.

Gentlemen: Your letter of April 21st giving us the dates of the various cases in which we are both interested in Portland, is at hand, and so far as present indications show, these dates of trial will be very satisfactory.

I have spoken to Mr. Stoll regarding the same and he also appears to be satisfied, so that you merit the thanks of both of us for whatever you have done to bring about this result.

I take it that any arrangement or stipulation that I may make with Mr. Stoll will be entirely satisfactory to you with regard to any of these cases.

Again thanking you for your continued courtesy in these and other matters, I remain

Very truly yours,

JOHN D. GOSS."

The case was called for trial June 17, 1914.

Plaintiff in Error was notified of this date by letter dated April 21, 1914 (Tr., pp. 80-81), and on April 24, 1914 (Tr., p. 82) acknowledged receipt of such letter.

It therefore had from April 24, 1914, to June 17, 1914, within which to procure its witnesses. It failed

to do so. Such failure was not attributable to any fraud or other deceitful act of Parker or his attorneys. This certainly is not diligence.

In addition, at the trial the testimony of alleged contradictory statements by Parker to other witnesses was given, and the absent witnesses, as well as the newly discovered witnesses, would only be cumulative.

The Court did not err in either refusing the continuance or overruling the motion for a new trial on the first three grounds specified.

See authorities of respondent under Points 1, 4, 5 and 6.

This disposes of Errors II and III, discussed at pages 64 and 65 of the brief of Plaintiff in Error.

THE RELEASE.

Plaintiff in Error has misconceived the basis of this action.

This is an action upon an executed parol agreement. The agreement to settle the claims of Parker against the company was made in May, 1909, and Parker was put to work. The release involved is dated September 25, 1909, at which time Parker had returned from the hospital where he was operated upon for appendicitis, and signed the release and resumed his work.

The chronology, then, of the events out of which this case arises, is as follows:

1. Parker was injured December 16, 1908 (Tr., p. 105).

2. The injuries, with consequent treatment, re-

sulting in blood poisoning, necessitating the amputation of his hand.

3. In May, 1909, he talked with Mr. Smith (president) and Mr. Mareen (general superintendent) about a settlement and going back to work (Tr., pp. 107-108).

4. It was agreed by Mareen that "we will give you a job as long as the company holds together or as long as you want it." (Tr., p. 108.)

* * * * * * * * * *

> "No, I didn't accept it at that time, so I said I would think it over and see. I said 'How about this doctor bill; I got another doctor on it,' I says to him. Well, he says, 'We will pay the doctor bill.' I also put up about the medicine I used, another drugstore; he said they would settle for that, too. So I went to work; I went to work in the meantime, if I remember right, and I worked a little over a month on the trimmer, helper. * * I worked about a month or a little over and took an attack of appendicitis."

5. It took about three months for him to recover from the appendicitis (Tr., p. 109). On his return, they put him back to work.

> (Parker, Tr., p. 109): "I came back and on my return they put me in as foreman taking machinery out of the Bay City Mill, and I filled the position until the mill was ready to work, that is run the yard, kind of straw-boss, and I went on as timekeeper, and filled that position until they started up the mill, then I went and filled the position as trimmer man there for about three years."

After Parker came back from the hospital (Tr., p. 109) the matter of the conclusion of the settlement

was talked again with Mareen, and the release, dated September 25, 1909, was signed.

6. At pages 110, 111, Parker says, inter alia:

Q. What was the final settlement as to employment?

A. He partly promised me the position as foreman of the Bay City Mill when they started that up. When the time came there was another man put in the position. I told him that I thought I would be able to handle that job, but this fellow had a better pull than I had, so he got it and they put me in this trimmer job.

Q. And what statement if any did they make to you at the time this release was signed about giving you a job and what kind of a job?

A. Said would always give me a job and something better than common work.

(Tr., p. 111):

Q. That was part of the whole settlement?

A. Yes, sir.

Q. How long did you work for them?

A. Altogether?

Q. Yes.

A. I worked about six or seven weeks.

Q. I mean after you got hurt; after you made this settlement how long did you work for them?

A. I worked for them until after my brother got killed, after I brought this trial. I forget now the date.

Q. How long did they tell you before the settlement you might have the job for?

A. As long as I wanted it.

Q. Now, after you started work there, what different positions did you fill?

A. Well, first I went on as helper in the trimmer box; then I took appendicitis and came back and went on as foreman, then as timekeeper and from that to trimmerman.

COURT: Talking of working before or after the settlement?

A. After the settlement.

COURT: You had appendicitis before the settlement?

A. Yes, before the settlement.

COURT: He is asking what work you did after the date of settlement.

A. This was after the date of settlement, this work.

Q. (Tr., p. 112). You filled various places there after that, did you?

A. Yes, sir.

Q. What wages did they pay you?

A. Excuse me a minute. I was helper on the trimmer before my operation for appendicitis.

COURT: That was before the settlement?

A. That was before the settlement. We had talked the thing up before that.

COURT: But you didn't have the settlement until after you came back from the—

A. Appendicitis.

Q. State whether you accepted that settlement

on the understanding and promises he had made you as well as the other consideration?

A. Yes, sir. It was the understanding I was to keep employed.

From examination of the following witnesses, at the following pages, it was conclusively shown:

(a) The settlement was talked of and practically agreed upon about May, 1909.

Parker, Tr., pp. 105, 106, 108, 109, 110, 111, 112, 116, 125, 127.

(b) The statements as to his having a job were made to him before the release was signed, at the time the release was signed, and after the release was signed; and he actually had a job conditioned upon the settlement as stated by him **before the release was signed, was given a job at the time the release was signed, and kept on after the release was signed.**

Parker, Tr., pp. 132, 133, 134, 135.

7. At the time Parker signed the release, he asked them why they did not have the agreement for employment in writing, and was told as follows (Tr., p. 129):

"A. Well, at the time I had that settlement, he told me then that— I asked him why he didn't put that in writing, and he says these blanks are already made out, etc. He says will be no trouble about any settlement we have.

(Tr., p. 135.) Q. And then after this settlement, you went to work, did you?

A. Yes, sir.

Q. You called his (Mareen's) attention, you say, to the fact that there wasn't— about the job wasn't in the written form there at all?

A. I called his attention to it at the time, yes.

Q. What did he say about that?

A. Well, he says these here are made up in form like, and the company has this kept on record; "in regard to your being kept to work, that will be all right"; he says "you will always be kept employed."

Q. "You will always be kept employed," and after that you went to work, did you, right away?

A. Yes, sir.

8. After Parker had worked at different jobs, he was placed on the trimmer table, which was adjusted so he could handle it with one hand.

Parker, Tr., 112, 113.

9. Parker was discharged in 1913, for the following reason:

Parker had a brother who was killed at Marshfield, Oregon, and Parker was appointed administrator of his estate. As such, he brought action to recover for his brother's death.

The company never told him that he would be discharged for that reason, but when he left to attend the trial, his place was filled and he was never reinstated.

Parker, Tr., pp. 113, 114, 115.

Mrs. Parker, Tr., p. 248.

Mareen, Tr., pp. 184, 185, 186, 187.

10. Parker's ability to work and render satisfactory service is admitted. (Tr., p. 188):

Q. And do it well, satisfactorily. Earn his money, give you value received for his money, couldn't he?

Mr. Goss: That is all admitted in the pleadings.

11. It is admitted that at all times there has been work for the company that Parker could do.

Witness Mareen (Tr., p. 187):

Q. And there is lots of work there he is able to do, and could do?

A. Same now as then.

Q. Same now as then?

A. Yes, sir.

Q. And when he called you up and wanted to go back to work, there was work that he could do, wasn't there?

A. The mill wasn't running at that time, I don't think.

Q. Now, will you kindly answer my question. Wasn't there work there he could do at that time?

A. Not at that mill. Yes, would be work there he could do.

12. After Parker was discharged, in January, 1913, he tried to get the company to take him back to work, which they refused to do.

Witness Mareen, Tr., p. 188.

Witness Catharine B. Parker, Tr., pp. 250, 251.

13. In inducing Parker to settle upon the representations as stated by him, the defendant acted through Mr. Mareen, its superintendent, who acted personally, and also through John F. Bain, foreman in its employment.

Mr. Bain states:

(a) Before the settlement he was approached by Mareen on the subject and talked with Parker.

(Tr., pp. 156, 157.) Later on, Mareen told Bain (Tr., p. 158):

> "It was the middle of the week or later, when he spoke to me, and I, of course, being interested in the case, asked whether or not he had made a settlement. He said to me that he had agreed with Jack for a settlement. He also told me that he had agreed to pay Jack's doctor bill, give him some money, put him to work, and that I was to find Jack something to do that he could do. Asked me at different times what there was in the mill I could put him at. I explained three different positions that I thought we could use Jack at to very good advantage, and then we talked the matter over again."

Q. What was said about the length of time that this job was to last?

A. Talking the matter over again, he told me that we were to put Jack to work, and that he was to keep him working. He had promised him a job, and I asked how long, how I could figure, whether we was to keep a job for Jack open at all times, or whether he was to draw a salary; didn't state it possibly in those words, but my intention was to find whether he was drawing salary whether working or not. He impressed on my mind in so many words that Jack was to have a job with him as long as Jack wanted to work. Finally on— I think at any rate the first day of June, either the first or second of June, 1907—(Sic. meaning 1909)—Jack went to work under my instructions, came back and applied for work. I put him in the trimmer cage as helper," etc.

Witness states that Parker was to have a job as long as he wanted it. (Tr., p. 160.)

Mareen was greatly pleased with the settlement. (Tr., p. 160.)

Witness continues (Tr., pp. 162, 163):

Q. Altogether. Now, this conversation that you had with Mr. Mareen was in June, was it?

A. I am quite sure it was in June.

Q. How do you fix it as being in June?

A. There were other things that occurred about that time of the year that brings to my mind it was about June.

Q. And that was the only conversation you had —was at that time, was it, with Mr. Mareen?

A. Oh, no.

Q. Well, what was the other one?

A. In regard to this particular case?

Q. Yes. That is what I mean, of course, in regard to this Parker case, of course.

A. Yes.

Q. That was the only one you had? You fix that as when Parker first went back to work, was it?

A. When he first went to work after his accident.

Q. Yes, that is what I am getting at. Before he had gone to work, Mr. Mareen spoke about it to you, or was it after he had gone to work?

A. Spoke to me before and after he had gone to work.

Q. Spoke to you first just before he went to work?

A. Yes, sir.

Q. Then how long after he went to work, when he spoke to you about it?

A. I can't state the exact length of time, but different times when he was around the work.

Q. Do you know when Parker had appendicitis? When he quit?

A. I think I remember distinctly when it was.

Q. That was after that, was it?

A. After his first accident.

Q. That was after he went to work this time?

A. Yes, sir.

Q. That is, he had appendicitis. Then he had to leave for quite a while on account of appendicitis, did he?

A. Yes.

Q. That was after this time that you speak of?

A. Yes.

Witness Mareen (Tr., pp. 166, 167, 168) states, concerning the promise for employment (166), the agreement to pay doctor bills (167, 168), that they paid the doctor bill (168), and at 169 says:

Q. Did you make any statement to him as to what the custom of the company was, that is, to Parker, with regard to men that were hurt or laid off when injured?

A. Yes, I made— I told him our custom of paying the men half time while they were laid up in the case of accidents.

Q. And did you make any proposition to pay him that?

A. I told him we would do the same by him in

that case, and he brought up an item of a drug bill that I think was included. We agreed to pay that.

Q. And how many conversations did you have before the final settlement, as we will call it, or when this paper was signed with him?

A. I couldn't say as to that. We had quite a few along from time to time.

Q. What did you represent to him in this conversation with regard to job or work?

A. I told him what our custom was, and that we would— that the fact that he had lost his arm, wouldn't deprive him of the same in his case. **That we would give him steady work and we would find some place that he could do, some work that he could do.**

* * * * * * * * * *

(Tr., p. 170.) Q. Was that made out on the day it was dated, September 25th?

A. Why, I couldn't say as to that. Sometimes the—

Q. It was about that time?

A. It was about that time. These documents are made out after the agreement is made, then the first time a man comes in, it is signed up.

Q. Now, at that time— what conversation at the time that was signed did you have with Mr. Parker?

A. I don't remember of any special conversation at that time, any more than in connection with signing it. We had it ready. It might have been signed the same day that I had the conversation with him; that is, I had the last conversation, the last talk with him in regard to it.

Q. What was said at that time about his employment, and about working for the company, his job?

A. I don't think there was anything said at that time.

Q. You had discussed that with him before, had you?

A. Had discussed that with him before.

Q. Now, what composed the terms that make up the amount of that statement that was put in there, if you remember?

A. Why, it was the regular half pay. I don't know whether the drug bill was in this amount, or whether that was given— a separate check given for that. I think it was in this amount, included in this account.

Witness states that this was after Parker was operated on for appendicitis; that he was under the impression that Parker was not at work, but does not know; that Parker was kept employed right along after signing the release; that Mareen saw him at various times and was interested in him.

(Tr. 170-172.) And concerning the conversation which Parker had about the agreement for employment not being in writing, the witness says:

(Tr. 172): Q. Mr. Parker has testified to having spoken to you at that time, about there being nothing in there about his employment?

A. I don't remember of any such conversation.

* * * * * * * *

(Tr. 173): Q. **Did you say anything to him at that time about his job? About his having that a**

part of his settlement there, a job, anything to that effect?

A. We might have talked about it, yes. We might have talked about it before this was signed. I don't think we ever had an conversation after it was signed. The matter was closed and thoroughly understood.

Mareen admits the conversation between Mareen and Parker in the presence of Parker's mother, as testified to by Parker and his mother (Tr. 176, 177), and that Parker wanted to go back to work (Tr. 177). At Tr. 179, witness says:

Q. Mrs. Parker, in her testimony, says that Mr. Mareen admitted that the C. A. Smith Lumber & Manufacturing Co. had promised him work. Is that true?

A. That is correct.

Q. You had promised him work?

A. I had promised him work, yes.

Witness then claimed that the promise of work was not part of the settlement (Tr. 179), but said it was a part of the general custom of the mill to settle with men as he did with Parker. (Tr. 179, 166, 169, 177). And at 180, witness states:

Q. He wasn't working when this was signed, was he?

A. He had worked before that was signed, and after the first talk I had with him at the office, as I remember it.

* * * * * * * *

(Tr. 181): Q. And how much is this settlement?

A. How much is it?

Q. Yes. I don't mean in dollars, but I mean in amount of his earning capacity?

A. I don't understand you.

COURT: You said it was one-half of his wages.

Q. Half regular pay, was it?

COURT: And the doctor's bill and the drug bill?

A. I presume the figures are half his wages.

Q. That is your presumption only?

A. That is my presumption. I didn't figure it out. Had nothing to do with the figuring.

And at pages 181, 182, the witness, after stating that Parker was getting $3.00 per day, says:

Q. Now, did you pay him half his wages net to him, or did half his wages include the doctor's bill, and you take the doctor's bill out of his wage and pay it?

A. His settlement—half the wages that were paid is figured half the wages that the party was earning before the accident; the wages we paid him at the time of the accident.

Q. Did you pay that to him net or gross?

A. I don't remember as to those figures, whether they were net or gross.

Q. Now, did you have any men down there at Marshfield that were working for you, who had been injured in the mill, and whom you had kept in your employment at that time?

A. I couldn't state as to that. I think very likely that we did.

Q. But you don't know.

A. I couldn't swear to that, no, sir.

Q. Isn't it true that on this question of what you call your custom, that you told him your custom with the men in the east was to do that?

A. I don't know as to that. I might have told him that, but I think we had men employed around the plant at that time who were injured around the plant.

Q. But you won't swear to it?

A. I won't swear to it, no.

Witness then admits that Parker was hurt December 16, 1908, and (Tr. 184) says:

Q. Yes, sir. Now, wasn't your custom this: That when a man was hurt, that you paid him half pay, and took a release in full, and also gave him the job. Suppose they had refused to sign a release, what would you have done? Given him the job anyway or not?

A. We would have given him a job probably, until he commenced suit, if he did commence suit.

Q. Probably. You never had a case of that kind arise, did you?

A. I think we have, yes, sir.

Q. In this country?

A. I am not positive. Probably not before this suit. We have in this country, yes, sir, since then.

Q. Since then, not before?

A. No, I don't think so.

Concerning Parker's discharge, Mr. Mareen admits that it was because Parker, as administrator of his deceased brother's estate, had sued the company. (Tr. 184, 185, 186, et seq.)

The following facts, therefore, are admitted in this case:

(a) Parker was injured December 16, 1908;

(b) The injuries resulted in amputation of his hand;

(c) About May or June, 1909, negotiations for settlement were begun and practically agreed upon. The terms fixed were as follows: That Parker should have a steady job; that the company would pay his doctor bills and drug bills; that it would pay him one-half time from his injury.

(d) **At that time Parker went to work with the distinct understanding that he was to have a steady job, and worked about a month.**

(e) He had appendicitis, was operated on, and was absent from his work until about September.

(f) Thereupon he returned to his work.

(g) A release dated September 25th appears in the record.

(h) Nobody will swear that it was executed the day it bears date.

(i) However, he was given work under the agreement that he should have a steady job, and he actually worked for the company both before and after the release was given, and he was promised this steady job before, at the time of, and after the instrument was signed.

13. In this case, Parker states that it was the positive agreement that he would be and was given a steady job; he is sustained in this by the testimony of his mother, by the admission of Mareen to his mother, by Mareen's own testimony, and by the testimony of Bain.

After he went to work, the company fixed a trimmer for him. (Tr. 185).

Plaintiff's Theory of Case.

It was, and is the theory of the defendant in error that the agreement for a settlement was made in May or June, 1909, and thereupon Parker was given work in accordance therewith; that he worked for about a month under that agreement for settlement, and that the pretended release in evidence was simply a part performance of the oral contract which was executed by giving him employment, and this was the main object of his settling.

The complaint in this case was framed exactly upon this theory. See allegations VI, VII, (Tr. 7 and 8).

With this explanation of the theory of this case presented to the trial court, it will be found that the plaintiff in error has not cited a single case in point.

In none of the cases which it has cited are the elements above set forth, shown. The testimony specified herein is, we think, conclusive upon the designated points:

(a) That the settlement was agreed upon in May or June, 1909.

(b) That Parker went to work under that agreement for settlement.

(c) That he was then and there given a steady job.

(d) After his operation he returned.

(e) He was again put to work.

(f) The release, though dated September 25th, was not proven to have been signed that day.

(g) He was given steady employment and worked continuously until January, 1913. This employment was in accordance with the agreement made in May or June, 1909.

(h) Mareen and Parker both agree on the terms of the settlement. Mareen claims that it was the custom of the company so to do in settlements with injured men. Parker says it was expressly made in his case. Whichever is correct, it is admitted that the agreement was as alleged in the complaint.

Plaintiff in error has not cited a case where the agreement was of parol nature and was executed; nor where the injured man was put to work before, as well as after, the signing of the alleged release, nor where there was any such custom as Mareen claims existed in this case.

Taking up the citations by plaintiff in error seriatum:

1. Burdo v. Burgess, 83 N. E. 318.

The facts are nothing like those at bar. The case is a bald construction of the term "sole consideration."

2. 17 Cyc 621,—Facts not the same.

3. Coon v. Knapp, 8 N. Y., 402, 403.

Involves a receipt. The ruling is contrary to the decisions in Oregon cited heretofore.

4. Allen v. Rutland, 65 Atl. 138 (140).

Joint tort feasors. One was released; the other one sued, and the release held good defense. In that case a rule was announced which turns the case in favor of Parker, to-wit:

> "The rule that written agreements cannot be varied by parol operates in favor of those who were parties to it, **whenever it was executed by the latter as a final embodiment of their agreement—and parol evidence is offered to vary the legal effect of the terms in which it was expressed.**"

No such facts exist at bar.

5. Squires v. Inhabitants of the Town of Amherst, 13 N. E. 609.

Action for damages in tort, and not for breach of executed parol contract.

6. Jackson v. Ely, 49 N. E. 792.

No executed parol agreement for work.

7. Cassilly v. Cassilly, 49 N. E. 795.

Is (1st) a receipt; (2) a release; (3) an instrument of gift—not in point.

The entire and complete relationship was expressed in writing.

8. D. & R. G. v. Sullivan, 41 Pac. 501 (504).

Joint tort feasors. One released, the other sued.

It was claimed the release given was a receipt for wages.

On this last point the **case is contrary to**

Bissett v. P. R. L. & P. Co., 143 Pac. 991 (Oregon).

9. Vaughan v. Mason, 50 Atl. 390.

Action for damages.

Per contra Bissett v. P. R. L. & P. Co., 143 Pac. 991 (Oregon).

10. Moore v. M. K. & T. R. Co., 69 S. W. 997 (1000).

Is opposed to Lumley v. Wabash Ry. Co., 76 Fed. 66; also G. N. Ry. Co. v. Fowler, (9 C. C. A., 136 Fed.. 118).

11. Teague v. Ricks, 100 S. W. 795 (795).

An attempt to establish a parol trust in land contract of conveyance with a lease back to grantor.

12. St. L. & S. F. R. Co. v. Dearborn, 60 Fed. 880 (881, 882).

Action for tort which was settled.

13. The Cayuga, 59 Fed. 483 (485).

The case involved a proceeding to recover damages for things already released.

14. Boffinger v. Tuyes, 120 U. S. 198.

Clearly not in point.

15. Tate v. Wabash R. Co., 110 S. W. 622.

Executory contract, as distinguished from executed. In addition, the reply **in this case** puts in issue the very things which the reply there failed to do. The pleadings here admit that the document was signed **but the purposes and objects as set forth in the answer are clearly denied by the reply.**

16. Smith v. Ga. R. & B. Co., 62 S. E. 673 (674).

The contract was purely executory as to matters not recited.

17. Pennsylvania Gas Co. v. Thompson, 61 S. E. 829.

Action for injuries for which settlement had been made.

18. I. U. Ry. v. Houlihan, 60 N. E. 943.

An Indiana case which sustains Pennsylvania Co. v. Dolan, 32 N. E. 832, relied upon by defendant in error, and shows the distinction in the recitals. Concerning Pennsylvania Co. v. Dolan, this decision cites that case as illustrative of the considerations not contractual.

19. Clark v. Mallory, 56 N. E. 1099.

Release of one of two joint debtors as defense to action in debt.

20. Van Bokkelyn v. Taylor, 62 N. Y. 105, and
21. Harvey v. D. & R. G. R. Co., 99 Pac. 31, are not on an executed parol contract.
22. Norfolk v. Mundy, 66 S. E. 61.

Not analogous to the case at bar.

23. Leddy v. Barney, 2 N. E. 107.

Action for injuries which had been settled for; also joint tort feasors and one released.

24. White v. Richmond & D. R. Co., 15 S. E. 197.

Plaintiff's evidence alone not sufficient to establish employment.

There the contract was executory as to hiring. Here it was executed. **The release contains express covenants,** among which is:

> "He further covenants that he releases the defendant 'from any further liability or care of me (himself) on account of said accident.' "

25. A. T. & S. F. Ry. Co. v. Van Ordstrand, 73 Pac. 113 (116).

Allusions to future employment made by agent. Action for negligence after settlement for negligence. Release different.

26. Myron v. W. R. Co., 32 Atl. 165.

Representations for future employment never fulfilled. No executed agreement.

27. Chaplin v. Gerald, 71 Atl. 712.

No executed parol agreement before release signed. No custom. No admitted contract.

28. Williams v. C. R. I. & P. R. Co., 158 S. W. 967.

29. Rapid Transit Co. v. Smith, 86 S. W. 322 (323).

Neither of these cases has the same facts. No executed parol agreement.

30. Millich v. Armour Co., 56 Pac. 1.

Not executed—wholly executory. Facts wholly different.

31. Jessup v. C. & N. W. Ry. Co., 68 N. W. 673.

Facts entirely different.

32. Cummings v. Baer, 31 N. W. 449. Not in point.

33. Baum v. Lynn, 18 Sou. 428 (430).

The guardian having devastated an estate, transferred property to his ward for release of his personal responsibility, and thereafter attempted to claim transfer as a bar to his responsibility as guardian.

How that case can apply here, we do not see.

As heretofore stated, the authorities cited by the plaintiff in error do not apply the points of this case at all.

Here the complaint is framed upon the theory of the executed parol contract which was executed prior to the signing of the document.

That the contract was made as alleged cannot be disputed.

Mareen claims that the payment of Parker's half salary from the time he was injured, December 16, 1908, to the settlement, was in accordance with the custom of the company. He did not qualify so strongly on the custom to give employment to a man unless he signed a release.

But Parker was given employment in June, 1909, and the contract there became binding.

Sealed and Unsealed Instruments.

The short space of time which we had in which to check the citations in plaintiff's brief has prevented us from accurately showing as to whether the cases upon which he relies are those which are based upon the common law distinctions between sealed and unsealed instruments. We feel confident that a number of these cases are from states and in jurisdictions wherein the distinction between sealed and unsealed instruments still exists. However, in Oregon, this distinction is abolished by statute.

> Olston v. O. W. P. & R. Co., 52 Ore. 343 (349 et seq.).

The Issues.

An examination of the issues in the case will show that they are narrow and few.

The complaint (Tr., pp. 5-10) alleges:

Par. 1. The incorporation of defendant, which the answer admits.

Par. 2. That plaintiff is a millwright, which the answer admits.

Par. 3. That plaintiff was working for defendant in December, 1908; his earning capacity, and the deduction of the hospital fee.

The answer (Tr., p. 32) admits all of Paragraph 3 save where it denies that as part of the contract of employment the defendant (Plaintiff in Error) agreed to provide Parker with the services of a physician, and alleges that Dr. Dix was employed by Parker.

Par. 4. The injury in December, 1908; the treatment by the physician; the blood poisoning, and the necessary amputation of Parker's hand.

The answer (Tr., p. 33) denies Paragraph 4.

Par. 5. By reason of the matters Parker claimed to have a cause of action against defendant.

The answer (Tr., pp. 33-34) denies this.

Par. 6. That in the month of May, 1909, the agreement for settling the claimed liability was made and specifically alleges the oral agreement to give employment.

The answer (Tr., p. 34) alleges that the plaintiff and defendant entered into an agreement in writing on September 25, 1909, which has heretofore been set out. Also at Paragraph 7 (Tr., p. 34), that the

release was the only settlement ever made and "was the only release or settlement agreement ever executed by the plaintiff and the defendant, and was intended and understood by all the parties thereto to be and was a full and complete settlement," etc.

The reply (Tr., 39, 40) admits that the document was signed, but denies the other matters set forth.

Par. 7. That in pursuance of the agreement of May, 1909, to give Parker employment, he entered the employment of the C. A. Smith Lumber & Manufacturing Co. and continuously worked for them until January 31, 1913, earned the going wages as trimmer, and complied with the condition of his employment.

The answer (Tr., p. 35) alleges that by the written contract Parker is estopped, etc., and says:

> "And admits that Mr. Arno Mareen, the general superintendent of defendant, voluntarily informed the plaintiff that as long as conditions were satisfactory, and his work properly performed, he, on behalf of the defendant, would be glad to employ the plaintiff at such work as he could properly perform, but denies that said settlement or agreement was entered into upon consideration of any terms to that effect, or that as a part of, or an inducement to said settlement, any promise or agreement to that effect was made or entered into by or on behalf of the defendant, or that there was any promise or agreement or consideration whatsoever for said settlement other than that set forth and included in said writing above set forth."

The reply puts in issue the new matter.

Par. 8. That at all times the Smith Lumber Company was running saw mills and employing men

at work which Parker could do, but that it has wrongfully discharged him.

The answer (Tr., p. 35, Par. 9)

> "Admits that the plaintiff, both before and after said settlement, was employed by the defendant, and filled numerous different positions, and that he was employed for a time as trimmer in charge of a trimming machine in the mill of defendant; but denies that the plaintiff continued continuously in that position to the 31st day of January, 1913."

Par. 9. Plaintiff alleges his age, earning capacity, etc.

Par. 10. States his ad damnum.

The answer (Tr., pp. 36 to 38 inclusive) alleges (X) that Parker voluntarily severed his relations with defendant without cause; (XI) avers the going wages for work at which Parker was employed are from $2.50 to $3.00 per day; (XII) admits Parker's capability of earning $3.00 per day, and his capacity as a trimmer, measurer, etc.; (XIII) admits that the C. A. Smith Lumber & Manufacturing Company (Plaintiff in Error) was running its mill, but alleges that the mill was then shut down and not in operation; denies that Parker was willing to perform services, etc.; admits that defendant has not employed plaintiff since said date; (XIV) avers plaintiff's employment at other occupations; and (XV) denies all things not admitted.

The reply puts in issue the affirmative matters.

It is, therefore, seen that the issues were narrowed to the following:

1. Whether a verbal settlement was made about May, 1909.

2. Whether the employment was a part of the verbal settlement.

3. Whether the release was the sole or only settlement which they made.

4. Whether it expressed the full agreement.

Upon these issues, the verdict of the jury was in favor of the plaintiff, and the evidence conclusively shows that the oral contract which was made in May or June, 1909, was concluded before the release was executed.

In support of this, we state:

1st. The answer admits, and both parties testify that Parker entered the employment of the C. A. Smith Lumber & Manufacturing Co. **before the release was signed.**

2nd. Parker says it was in accordance with the agreement. The company denies that.

3rd. The doctor bill of $175 (Tr., pp. 127, 128) was paid before the release was signed.

(Parker, Tr., pp. 128, 129, 131.)

(Mareen, Tr., p. 168.)

4th. The release, in all probability, was made out and waited several days before it was signed.

(Mareen, Tr., p. 170.)

5th. At the time the release was signed, Parker called Mareen's attention to the absence of provision for a job in it and was assured that the job was all right anyway.

(Parker, Tr., p. 129):

A. Well, at the time I had that settlement, he told me then that— I asked him why he didn't put

that in writing, and he says these blanks are already made out, etc. He says will be no trouble about any settlement we have.

(Tr., p. 135.) Q. You called his attention, you say, to the fact that that wasn't— about the job wasn't in the written form there at all?

A. I called his attention to it at the time, yes.

Q. What did he say about that?

A. Well, he says, these here are made up in form like, and the company has this kept on record; "in regard to your being kept to work, that will be all right," he says. "You will always be kept employed."

Q. "You will always be kept employed," and after that you went to work, did you, right away?

A. Yes, sir.

Witness Mareen (Tr., p. 173):

Q. Did you say anything to him at that time about his job? About his having that a part of his settlement there, a job, anything to that effect?

A. We might have talked about it, yes. We might have talked about it before this was signed. I don't think we ever had any conversation after it was signed. The matter was closed and thoroughly understood.

And at page 180, Mareen says:

Q. When was it that you first promised him work, and that he could have it as long as he wanted it?

A. The first time I talked with him in the office.

Q. The first time you talked with him after he was hurt, and you— how often did you repeat that?

A. What is that?

Q. How often at other times? How many other times did you tell him he could have steady work?

A. I outlined the proposition at that time, and while it might have been referred to at our other meetings, **it was taken care of at that time.**

The above is from Mareen's direct examination.

On cross examination, he says (Tr., p. 180):

Q. And you made this settlement for— this settlement in this release that is in evidence, before he went back to work steadily, didn't you?

A. Made this settlement?

Q. Yes.

A. No.

Q. He wasn't working when this was signed, was he?

A. HE HAD WORKED BEFORE THAT WAS SIGNED, AND AFTER THE FIRST TALK I HAD WITH HIM AT THE OFFICE, AS I REMEMBER IT.

Concerning the sum that was paid Parker as half his earning capacity, the following is uncontradicted:

Parker (Tr., p. 131):

Q. (Referring to the release.) And it reads it is for $410.75. How did you arrive at that amount?

A. What?

Q. How did you arrive at that amount, $410.75?

A. He figured up the time I lost, split my wages in the middle.

Q. Called it half time?

A. Called it half time.

Q. And what did you add to that?

A. Didn't add anything to it.

Q. Didn't add anything to it. They paid the doctor $175.

A. Yes, sir.

Q. They paid that too, did they?

A. They had paid that beforehand.

We repeat that there is not a case or an authority which counsel cites that is analogous to this case and its facts.

Under the circumstances of this case and the issues made up in the pleadings, the Court correctly admitted evidence as to the true agreement of the parties and submitted the entire contentions to the jury.

Mobile, etc., R. Co. v. Jurey. 111 U. S. 584 (597); (Book 28 L., 527, especially 530).

In the above case, the court says:

> "The first assignment of error argued by the counsel for plaintiffs in error relates to the admission in evidence of the testimony of Jurey and Scott, in respect to the terms of the contract by which the Railroad Company undertook to transport the cotton of the defendants in error to New Orleans. The contention is that the bill of lading was the contract, and being in writing, no parol evidence could be received to vary its stipulations. Before this rule can be applied, the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was, what was the contract be-

tween the parties? No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing; in either case it is equally binding. (Cases.) The defendants in error insisted that the contract between them and the railroad company was by parol; that it was made between Jurey, for the defendants in error, and by Scott for the railroad company; and denied that the bill of lading was the contract, and alleged that it had never been delivered to the defendants in error, but only to Hall, who was not authorized to make a contract for them. It is plain, upon this statement of the controversy, that evidence of the parol contract was perfectly competent, and it was a question to be decided by the jury whether the understanding as detailed by the witnesses or the bill of lading expressed the agreement of the parties. The evidence that the contract was by parol and was not the contract expressed in the bill of lading, came from Jurey, one of the defendants in error, and from Scott, the agent of the plaintiff in error, between whom it was made, and was not contradicted. The contention that this evidence should have been excluded is certainly not based on any solid ground. There is nothing in this assignment of error for which the judgment should be reversed."

In P. C. Co. v. Yukon, 155 Fed. 29 (page 37) (9 C. C. A., per Hunt, J.), this court says:

"The appellants earnestly contend that the court erred in admitting evidence of a prior parol agreement between the parties which tended to modify the terms of the bills of lading. The evidence so admitted tended to prove the negotiations antecedent to the shipment and the common understanding that the appellants intended to take advantage of the market prices

prevailing at points on the Yukon River at the opening of navigation. It tended to show that the probable presence of ice in the St. Michaels Harbor was contemplated, and that the contract was made with the special understanding that delivery was to be made as soon as the harbor was free from ice. It showed also that the bills of lading were signed late at night, and at about the last minute before the boat went out. All of this evidence was admitted for the purpose, not of modifying the provisions of the bills of lading, but of showing the intent and purpose of the contracting parties, and aiding the court to construe the bills of lading with reference to that intent. The bills of lading were printed forms applicable to different consignments of goods to different ports. In Hutchinson on Carriers (3d Ed.) Sec. 622, it is said:

" 'But the main object and intent of the contract is the voyage agreed upon, and, while the printed general words must not in construing a contract be discarded, it is well recognized that, when considering what the main object and intent of the contract is, it is proper to bear in mind that a portion of each is on a printed form applicable to many voyages, and is not especially agreed upon in relation to the particular voyage.'

"See, also, Marx v. National S. S. Co. (D. C.), 22 Fed. 680; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527.

"But if, indeed, the parol testimony so admitted in evidence did have the effect to modify some of the provisions of the bills of lading, it was, under the circumstances disclosed in this case, admissible for that purpose, for the bills of lading were issued after the goods had been

> delivered on board the Senator, and after they had passed from the control of the shipper, and the vessel was about to go on her way. The burden was then upon the carrier to show that its agents directed attention to the terms of the bills of lading and that the shipper assented to them. (Cases.)"

So, in the case at bar, the prior parol contract of May or June, 1909, under which Parker was put to work, and under which the doctor bills were paid, was a valid or subsisting contract, and Parker denies that the mere formal receipt dated September 25, 1909, was the contract between them.

Under the issues of the case, the court had no alternative except to hear the entire controversy, and the verdict of the jury being in favor of Parker, it must stand.

The appellant does not contend that the evidence was insufficient to sustain the verdict—his sole contention is that the court erred in admitting oral testimony.

Indeed, in the assignments of error, which are discussed in the brief, as well as in the bill of exceptions itself, there is no error predicated upon the admission of the evidence. The sole errors charged relate to the overruling of the demurrer; the motion for non-suit; the motion for directed verdict; the motion for new trial; and the instructions given by the Court. At no place does counsel assign or argue or discuss any error in the admission or rejection of testimony.

For all these reasons, we respectfully submit that this case should be affirmed.

WILLIAM T. STOLL, Marshfield, Oregon, and
ISHAM N. SMITH, Portland, Oregon,

Attorneys for Defendant in Error.

Due service, by three certified copies, accepted at....., this..... day of February, 1915.

.....

Attorney for Plaintiff in Error.